Supreme Court, U.S.

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No. 98-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

FULL GOSPEL TABERNACLE and JORGE VEGA,
Pastor of Full Gospel Tabernacle,

Petitioners,

v.

COMMUNITY SCHOOL DISTRICT 27, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a school district violate the First and Fourteenth Amendments to the U.S. Constitution when that district denies a community group equal access to the use of its facilities during nonschool hours for the sole reason that the intended use, while otherwise permissible, may be characterized as "religious services or religious instruction"?

2. Is a policy governing use by community groups of school district facilities during nonschool hours unconstitutional under the First and Fourteenth Amendments, when that policy

   -- allows "instruction in any branch of education, learning or the arts" but forbids "religious instruction," and

   -- allows "social, civic and recreational meetings or other uses pertaining to the welfare of the community," as well as "discussing religious material or material which contains a religious viewpoint and . . . distributing such material," but forbids "religious services"?

PARTIES

The caption of the case contains the names of all of the petitioners. Petitioner Full Gospel Tabernacle is a corporation. It has no parent or subsidiary companies. *See* S. Ct. Rule 29.6.

In addition to the parties listed in the caption to the case, the following were defendants-appellants in the court below and are respondents here:

> COMMUNITY SCHOOL BOARD 27 OF THE CITY OF OZONE PARK; MICHAEL WEITZ, in his official capacity as Principal of Public School 105 Queens; SHEILA McELHATTEN, in her official capacity as Secretary to the Director of Operations; BRENDA ISAACS, in her official capacity as Community Superintendent of Community School District 27; KENNETH L. GROVER, in his official capacity as Deputy Superintendent of Community School District 27; JAMES EGAN; DONNA MARIE CALTABIANO; ERNEST BROWN; SHALOM BECKER; JAMES G. ADAMS; RICHARD J. ALTABE; GERALDINE CHAPEY; STEVEN GREENBERG; JAMES SANDERS, JR., in their official capacity as members of Community School Board 27; and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF NEW YORK.

The Attorney General of the State of New York was an intervenor-defendant-appellee in the court below and is a respondent here.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Full Gospel Tabernacle and Jorge Vega, plaintiffs-appellants in the court below, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case at bar.

DECISIONS BELOW

All decisions in this case to date are entitled Full Gospel Tabernacle v. Community School District 27. The decision of the district court granting summary judgment to respondents (defendants-appellees below) is reported at 979 F. Supp. 214 (S.D.N.Y. 1997). App. B.[1] The order of the Second Circuit denying en banc consideration is unpublished. App. C. The decision of the Second Circuit affirming summary judgment is reported at 164 F.3d 829 (2d Cir. 1999). App. A.

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[1] "App." refers to the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued the decision for which petitioners seek review on January 25, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix D. The text of New York Education Law § 414 is set forth in Appendix E. Excerpts of the pertinent school district policy are set forth in Appendix F.

STATEMENT OF THE CASE

In New York State, school districts by statute are authorized to make their facilities available to outside users when not in use for school purposes. See N.Y. Educ. Law § 414 (App. E). Respondent Community School District 27 ("CSD 27" or "the District") implements this statute through the Standard Operating Procedures Manual (SOPM), which sets forth regulations for use of school facilities during nonschool hours. The SOPM provides in part as follows:

> 5.6 In addition to the use described in items 2.11, 5.3 and 5.5, school premises may also be used for the following purposes:
>
> 5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

> 5.6.2. For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

App. 33a. The SOPM also provides as follows:

> 5.9 No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

App. 34a (emphasis added).

CSD 27 has approved thousands of applications for use of its school facilities. Among the applicants allowed use of school facilities (and the corresponding approved uses) are the following:

- American Legion ("County Convention Awards Assembly");
- ARYA SAMAJ USA, Inc. ("Cultural Evening");
- Dance Dimension ("Dance Recital Rehearsals");
- Department of Sanitation ("Basketball");
- Belle Harbor Property Owners Association ("Board of Directors Meeting");
- Rockaway Action ("Mural Painting")
- Mercaz Hatorah ("Basketball Program");

- Congressman Shumer ("Town Hall Meeting");
- Queens Kiwanis ("Girls Softball Team");
- Tappin-Feet ("Dance Recital");
- LWG Co-op Inc. ("Shareholders Meeting");
- Local 372 ("Union Meeting");
- IUOE Local 30 ("Union Meetings");
- Eye of Tiger Karate ("Karate Tournament"); and
- Creative Arts ("Gospel Cantata").

App. 6a n.3. Religious groups, including churches, are eligible to use school facilities during nonschool hours. CSD 27 has approved the use of its facilities, for example, by St. Mary's Church ("Biddie-ball"), Church of St. Paul ("Gospel Choral Performance"), New Hope Baptist ("Gospel Recital"), Salvation Tabernacle ("Sacred Concert"), Rabbi Shlomo Volner NCFJ ("Purim Party"), and Way Of Life Gospel Center ("Gospel Recital"). Id.

Until approximately the end of 1994, CSD 27 also approved the use of its facilities for religious services, including Bible studies and religious services by the Deliverance Temple Church and worship services by the Jesus Family Fellowship Church. App. 6a-9a.

Petitioner Full Gospel Tabernacle ("the church") is a church that in early 1994 was meeting in a building owned by the church in Far Rockaway, New York. At that time Robert Castro, a plaintiff below, was the pastor of the church.[2] In late April 1994, because church membership exceeded the capacity of the church's building, the church decided to seek an

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[2] Petitioner Jorge Vega subsequently replaced Castro as pastor and was substituted for Castro as a plaintiff in this case. App. 4a n.1.

alternative location for Sunday worship services. App. 5a.

On May 6, 1994, Pastor Castro applied to use CSD 27 facilities during nonschool hours in June for the Sunday services of Full Gospel Tabernacle. On May 16, 1994, respondent Kenneth L. Grover, Deputy Superintendent of CSD 27, wrote Pastor Castro a letter denying the application and quoting the following portion of SOPM 5.9:

> No outside organization or group may be allowed to conduct religious services or instruction on school premises after school.

Pastor Castro applied once more, seeking use of CSD 27 facilities for Sunday services in July, 1994. Respondent Grover, this time by telephone, in June of 1994, again denied the application. App. 5a-6a.

Pastor Castro retained counsel for himself and the church, and counsel sought to resolve the matter informally with school officials. The pertinent school officials gave no substantive response for months, asserting that the matter was being given the "utmost consideration." See Ex. D to Complaint (letter from attorney for Chancellor of Board of Education of the City of New York).

Meanwhile, CSD 27 began clamping down on the use of its facilities for worship services. The District rescinded a permit issued for the Jesus Family Fellowship, on July 21, 1994, after five biweekly services, citing SOPM 5.9. The District also halted the year-old use of CSD 27 facilities by the Deliverance Temple Church, in November of 1994, again as the enforcement of a ban on worship services. App. 7a-9a.

Pastor Castro and Full Gospel Tabernacle filed suit on November 2, 1994, in the U.S. District Court for the Southern District of New York. The suit named as defendants CSD 27 and various school district officials. Jurisdiction was based on 28 U.S.C. §§ 1331, 1343. Castro and the church sought injunctive and declaratory relief, alleging a violation of their rights under the First and Fourteenth Amendments to the U.S. Constitution. Castro and the church challenged the constitutionality of both SOPM 5.9 and N.Y. Educ. Law § 414, the proffered authorities for denying the church equal access to school facilities during nonschool hours.[3]

On November 28, 1994, Castro and the church moved for a preliminary injunction granting them equal access to CSD 27 facilities. The Attorney General of New York intervened in defense of the constitutionality of New York Education Law § 414 and in opposition to a preliminary injunction.

In April of 1995 Castro and the church moved for summary judgment. At the same time, petitioner Pastor Jorge Vega sought leave to substitute for Castro as plaintiff because Vega had replaced Castro as pastor of Full Gospel Tabernacle. CSD 27 cross-moved for summary judgment.

On September 24, 1997, the district court denied petitioners' motions for a preliminary injunction and for

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[3] Section 414 does not by its terms forbid religious instruction or worship during outside uses of school facilities. A New York appellate court, however, construed section 414 to authorize use only for "enumerated purposes" and held that because uses for "religious purposes" are not listed in the statute, no such uses are authorized. Trietley v. Board of Educ., 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978).

summary judgment and granted summary judgment for respondents CSD 27, et al. Full Gospel Tabernacle v. Community School Dist. 27, 979 F. Supp. 214 (S.D.N.Y. 1997) (App. B).

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit. Because that court had recently rejected a similar claim by a church seeking equal access to school facilities, see Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207 (2d Cir. 1997), cert. denied, 118 S. Ct. 1517 (1998), petitioners moved for en banc consideration. That motion was denied. App. C. On January 25, 1999, the Second Circuit affirmed, in a brief per curiam opinion, adopting the reasoning of the district court. Full Gospel Tabernacle v. Community School Dist. 27, 164 F.3d 829 (2d Cir. 1999) (App. A).

REASONS FOR GRANTING THE WRIT

This case presents the question whether a governmental body may deny a community group equal access to the use of its facilities -- here, school district rooms during nonschool hours -- for the sole reason that the intended use, while otherwise permissible, may be characterized as "religious services or religious instruction."

There is no question that the respondent school district, CSD 27, has opened its facilities, pursuant to statute (N.Y. Educ. Law § 414) (App. E) and policy (SOPM 5.6 & 5.9) (App. F), to use by private groups. Churches and religious organizations are admittedly eligible users. Religion is undeniably a permitted topic. See SOPM 5.9 (App. F) ("the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or

material which contains a religious viewpoint or for distributing such material is permissible"). Permissible uses also undisputedly include all the secular components of religious worship and instruction, such as singing, dancing, meeting, giving honor to someone or something (e.g., the "County Convention Awards Assembly"), cultural exercises, sharing concerns, discussing literary works, and making presentations. Respondent CSD 27 only bars uses of this type which have a particular religious dimension, i.e., uses that, according to CSD 27, are characterized as "religious services or religious instruction."

Thus, for example groups may use CSD 27 facilities to study the Scriptures,[4] but not if they do so from the perspective of believers.[5] They may sing religious hymns for musical entertainment, but not for the worship of God. They may hold ceremonies to honor the Mayor, but not the Maker.

Such blatant anti-religious discrimination violates the U.S. Constitution in multiple respects. Infra § II. By upholding this flagrantly unconstitutional discrimination, the Second Circuit stands in conflict with every other federal circuit to consider the issue. Infra § I.

This Court should grant review.

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[4] SOPM 5.6 & 5.6.1 provide: "school premises may be used . . . [f]or the purpose of instruction in any branch of education, learning or the arts . . . ."

[5] SOPM 5.9 provides: "No outside organization or group may be allowed to conduct . . . religious instruction on school premises after school."

I. THE DECISION OF THE SECOND CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF OTHER CIRCUITS.

The Second Circuit upheld in this case the discriminatory exclusion of religious worship and instruction as such from equal access to governmental facilities. This ruling conflicts with decisions of the First, Third, Fourth, Seventh, Eighth, and Tenth Circuits:

- **Fourth Circuit**: School board may not deny equal access to churches wishing to use school facilities for regular Sunday services. Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir.), cert. denied, 511 U.S. 1143 (1994) (holding unconstitutional, under Free Speech and Free Exercise guarantees, policy imposing up to five times higher rental rate on plaintiff church).

- **Tenth Circuit**: Policy denying equal access to government facilities for "sectarian instruction and worship" impermissibly restricts the viewpoint of would-be speakers. Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), cert. denied, 519 U.S. 949 (1996). Court explicitly rejected argument that ban on all sectarian instruction and religious worship was a viewpoint-neutral limit on subject matter. 84 F.3d at 1279.[6]

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[6] See also Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207 (D. Kan. 1983) (school district may not deny church equal access to its facilities for worship or other religious purposes); Shumway v. Albany County School Dist. No. One Board of Educ., 826 F. Supp. 1320 (D. Wyo. 1993) (school board may not deny equal access

- **Eighth Circuit**: School district may not deny equal access to its facilities to outside group wishing to engage in prayer, Bible reading, religious songs, and speeches. Good News/Good Sports Club v. School Dist. of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173 (1995). Court explicitly rejected argument that religious speech is a separate excludible category. 28 F.3d at 1506-07 & n.8.

- **Third Circuit**: School district may not deny equal access to school facilities for religious services and distribution of literature. Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir.), cert. denied, 498 U.S. 899 (1990).

- **Fifth Circuit**: Policy denying equal access to government facilities for "religious purposes," such as plaintiffs' prayer meetings, violates First Amendment. Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989).

- **First Circuit**: School district may not deny equal access to school facilities for "direct advancement of religion." Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5, 941 F.2d 45 (1st Cir. 1991).

- **Seventh Circuit**: Government may not deny equal access to its facilities, including school buildings, for religious uses. See Grossbaum v. Indianapolis-Marion County Building Auth., 63 F.3d 581 (7th Cir. 1995) (invalidating exclusion of menorah from nonpublic forum lobby where other private displays were allowed); Hedges v. Wauconda

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to its facilities for baccalaureate service).

Community Unit School Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) (overturning discriminatory ban on student distribution of religious literature);[7] Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) (upholding neutral restrictions on student distribution of literature).[8]

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[7] See id. at 1297-98:

> [N]o arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time. . . . Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. . . . Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.

[8] See id. at 1543-44 (citations and editing marks omitted):

> [S]peech cannot be suppressed or discriminated against solely because it is religious. . . . Banning religious expression, which the Free Exercise Clause of the First Amendment singles out for protection, . . . solely because it is religious is per se unreasonable.

See also May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1113-14 (7th Cir. 1986) (arbitrary exclusion of private religious speech from public school facilities would be unconstitutional); cf. Air Line Pilots Ass'n Int'l v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995) (striking down exclusion of ad from nonpublic forum display diorama). As the Seventh Circuit explained in Air Line Pilots, in assessing whether viewpoint discrimination exists, the "inquiry cannot be

In addition, district courts in the Ninth and Eleventh Circuits have held unconstitutional the denial of equal access to school facilities for religious services. See Wallace v. Washoe County School Dist., 818 F. Supp. 1346 (D. Nev. 1991) (church's Sunday services); Verbena United Methodist Church v. Chilton County Board of Educ., 765 F. Supp. 704 (M.D. Ala. 1991) (baccalaureate service).

Against this uniform line of authority, the Second Circuit stands alone.[9] This Court should grant review to resolve this conflict.

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evaded by retreat to the category of speech allegedly banned (here, 'political')." Id. at 1159. "Instead, the proper focus concerns whether or not the forum has included speech on the same general subject matter." Id. at 1160.

[9] The Second Circuit is stubborn in its refusal to allow equal access for religious users. See, e.g., Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980) (denying equal access to student Bible club), cert. denied, 454 U.S. 1123 (1981), overruled, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches Union Free School Dist., 959 F.2d 381 (2d Cir. 1992) (denying equal access to church wishing to show film with religious perspective), rev'd, 508 U.S. 384 (1993); Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) (denying equal access to church for worship services), cert. denied, 118 S. Ct. 1517 (1998). Absent definitive review by this Court, the direct conflict between the law in the Second Circuit and in every other circuit will persist.

II. THE DECISION OF THE SECOND CIRCUIT CONFLICTS SQUARELY WITH THE DECISIONS OF THIS COURT.

The Second Circuit has condoned the discriminatory exclusion of petitioners' intended activities because of the religious dimension of those activities. The incompatibility of this ruling with the precedents of this Court could scarcely be clearer. Indeed, the ruling below flies in the face of this Court's jurisprudence under four distinct constitutional guarantees: free speech, free exercise, establishment, and equal protection.

A. The Free Speech Clause

Religious worship, like other religious speech, is constitutionally protected. Widmar v. Vincent, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and association protected by the First Amendment") (and cases cited). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.

Id. (citations omitted) (emphasis added in part). The Free Speech Clause therefore precludes discrimination against religious speech, including worship. Id. at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination constitutes viewpoint discrimination. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993); Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 832 (1995) ("discriminating against religious speech was discriminating on the basis of viewpoint"). Viewpoint-based discrimination -- the most egregious form of content-based censorship, Rosenberger, 515 U.S. at 829 -- violates the right to free speech even in nonpublic fora. See Lamb's Chapel, 508 U.S. at 390-92; Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985) ("government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). Hence, no forum analysis is necessary to invalidate such censorship. Lamb's Chapel, 508 U.S. at 391-92.

In the present case, petitioner Full Gospel Tabernacle is an eligible user of school facilities, religious matter is an eligible topic, and gathering to sing, speak, learn, and celebrate are eligible uses. Respondent CSD 27 nevertheless excluded the church's expressive activities solely because the use would entail a forbidden perspective -- that of a believer offering worship to God. This is unconstitutional viewpoint discrimination, yet the Second Circuit upheld the exclusion. The Second Circuit ruled that there is a constitutionally decisive distinction between religious speech and worship. App. 21a n.9; id. 24a. But this Court has squarely rejected this very distinction as constitionally unsound, unworkable, and irrelevant. Widmar, 454 U.S. at 269 n.6.

B. The Free Exercise Clause

The Free Exercise Clause forbids the discriminatory restriction of religious activities. Such a restriction targets speech or conduct because it is religious and thus strikes at the very heart of the constitutional protection of religious freedom. Employment Division v. Smith, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status" or ban acts "only because of the religious belief that they display").

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.
>
> . . . .
>
> . . . There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of the law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532-33 (1993). See also McDaniel v. Paty, 435 U.S. 618 (1978).

In the present case, CSD 27 excludes worship because it is a religious ritual. The component activities -- gathering, singing, speaking, celebrating, and so forth -- are not otherwise objectionable uses. Just as in Lukumi, the government could

not forbid only religiously ritual slaughter of animals, so here CSD 27 cannot forbid only religiously ritual assemblies. Yet the Second Circuit condoned CSD 27's targeted exclusion of religious ceremonies and instruction.

C. The Establishment Clause

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court has often explained, the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). Accord Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action with an effect that "inhibits religion"). The discriminatory suppression of religious activities "would demonstrate not neutrality but hostility toward religion." Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990). Accord McDaniel, 435 U.S. at 641 (Brennan, J., concurring in judgment) ("The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion").

Moreover, discriminatory suppression of religious services and instruction requires the censor to make a judgment about what is and is not religious. This creates additional constitutional problems of "entanglement":

> [school officials] would need to determine which words and activities fall within "religious worship and religious teaching." The alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure

compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).

Thus, treating religious expression on equal terms with secular expression "would in fact avoid entanglement with religion," Mergens, 496 U.S. at 248 (emphasis in original; citation omitted).

In the present case, CSD 27 denies equal access precisely for those activities which it deems to be religious services or instruction, regardless of whether the intended use would otherwise be permissible. This is the antithesis of neutrality. Moreover, the policy at issue requires government officials to identify "religious services" and "religious instruction" by private groups in order to enforce the policy of exclusion. Government agents are thus compelled to classify the activities of privates citizens according to their perceived religious purposes. See, e.g., The Good News Club v. Milford Central School, 21 F. Supp. 2d 147, 154-58 (N.D.N.Y. 1998) (district court implementing Second Circuit's rule by carefully scrutinizing club's activities to determine whether they constituted forbidden religious instruction or permissible discussion from a religious viewpoint). Even if such a task were workable -- and it is not[10] -- it would be a wholly

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[10] A few examples may help illustrate the logistical and constitutional nightmare this policy of discriminatory exclusion creates.

Under SOPM 5.6.1, "instruction in any branch of education, learning or the arts" qualifies as a permissible use. Under SOPM 5.9, discussion of religious material, including

material with a religious viewpoint, is likewise permissible. But SOPM 5.9 forbids "religious instruction." Thus, one presumably may study the Bible, the Talmud, or the Koran to learn what it teaches. But catechesis is forbidden. How is the line to be drawn? By quizzing the participants on their desire to believe the text? What about a presentation of adult apologetics for a particular religion? Is that forbidden or permitted? What if Christian believers, to enrich their faith, arrange for a course (open to the public) taught by a non-Christian expert on the Dead Sea Scrolls or the Shroud of Turin? What if believing Muslims were to offer a course to the general public designed to dispel myths about Islamic doctrine? or to win converts?

The policy of CSD 27 also requires government agents to identify "religious services." The distinction between a forbidden and a permissible concert of sacred or seasonal music, to give one example, is far from obvious. Secular music fans can presumably gather for Handel's Messiah or a Mass by Beethoven. May the congregation of a local church do so as well? Does it matter whether the church describes the event as a concert or as a liturgical assembly? To take another example, the local chapter of the Christian Legal Society presumably could assemble at CSD 27 facilities to discuss practical issues for lawyers facing moral challenges in the professional world. What if the CLS members open the meeting with a time of prayer or worship? How much prayer is too much? Cf. App. 20a n.7 (inclusion of "opening prayer" and "closing salvation message" apparently was insufficient to trigger CSD 27's ban on religious services).

Considerations like these only reinforce the wisdom of this Court's insistence upon a neutrality that avoids the thicket of

improper role for a government censor. Widmar, 454 U.S. at 269 n.6, 272 n.11.

Despite all these defects, the Second Circuit upheld the discriminatory exclusion at issue here.

D. The Equal Protection Clause

The Equal Protection Clause likewise forbids discrimination against the religious expression of private speakers. "At a minimum," governmental classifications "must be rationally related to a legitimate government purpose," while "classifications affecting fundamental rights . . . are given the most exacting scrutiny." Clark v. Jeter, 486 U.S. 456, 461 (1988).

A restriction on religious speech -- and only religious speech -- obviously represents a classification "affecting fundamental rights," namely, the rights to free speech and free exercise of religion. Hence, strict scrutiny applies. There is no serious contention that some compelling need exists to exclude private religious speech from government facilities open to outside users; therefore, such restrictions are unconstitutional. Indeed, the arbitrary and selective prohibition of religious speech could only "rest on an irrational prejudice," City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 450 (1985) -- namely, a bias against religion as such -- which would "fail rationally to justify singling out" religious speech for special restrictions, cf. id. Accord Widmar, 454 U.S. at 281 (Stevens, J., concurring in judgment) (perceiving no valid reason to exclude religious worship where comparable secular

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government regulation of religious practice qua religious practice.

discussions are allowed). Yet the Second Circuit upheld CSD 27's arbitrary policy of exclusion of religious worship and instruction.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

In view of the Second Circuit's clear departure from the decisions of this Court and the consistent law of the other circuits, this Court should consider disposing of this petition by summary reversal of the judgment below under Rule 16.1.

Respectfully submitted,

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April 26, 1999

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FULL GOSPEL TABERNACLE and Jorge Vega, Pastor of Full Gospel Tabernacle is substituted in place of Robert Castro, Plaintiffs-Appellants,

v.

COMMUNITY SCHOOL DISTRICT 27; Community School Board 27 of the City of Ozone Park; Michael Weitz, in his official capacity as Principal of Public School 105 Queens; Sheila McElhatten, in her official capacity as Secretary to the Director of Operations; Brenda Isaacs, in her official capacity as Community Superintendent of Community School District 27; Kenneth L. Grover, in his official capacity as Deputy Superintendent of Community School District 27; James Egan; Donna Marie Caltabiano; Ernest Brown; Shalom Becker; James G. Adams; Richard J. Altabe; Geraldine Chapey; Steven Greenberg; and James Sanders, Jr., in their official capacity as members of Community School Board 27, and Board of Education of the School District of the City of New York, Defendants-Appellees,

Attorney General of the State of New York, Intervenor-Defendant-Appellee.

Docket No. 97-9235

Argued Jan. 11, 1999. Decided Jan. 25, 1999.

Before: WINTER, Chief Judge, VAN GRAAFEILAND, and KEARSE, Circuit Judges.

PER CURIAM:

We affirm for substantially the reasons stated by Judge Haight in the decision below. *See Full Gospel Tabernacle v. Community School District 27*, 979 F. Supp. 214 (S.D.N.Y. 1997).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Full Gospel Tabernacle and Jorge Vega,

Plaintiffs,

v.

Community School District 27, Community School Board 27 of the City of Ozone Park, Michael Weitz, in his official capacity as Principal of Public School 105 Queens, Sheila McElhatten, in her official capacity Secretary to the Director of Operations, Brenda Isaacs, in her capacity as Community Superintendent of Community School District 27, Kenneth L. Grover, in his official capacity as Deputy Superintendent of Community School District 27, James Egan, Donna Marie Caltabiano, Ernest Brown, Shalom Becker, James G. Adams, Richard J. Altabe, Geraldine Chapey, Steven Greenberg, and James Sanders, Jr., in their official capacity as members of Community School Board 27, and Board of Education of the School District of the City of New York,

Defendants,

Attorney General of the State of New York,

Intervenor.

No. 94 CIV. 7906(CSH)

Sept. 24, 1997.

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District Judge.

Plaintiffs, a church and its pastor,[1] seek access after school hours to a public school located in Community School District 27 to conduct religious worship services. Defendants, the Board of Education of the School District of the City of New York ("Board of Education"), Community School District 27, and certain of its officers and employees, have denied plaintiffs access to school facilities on the ground that N.Y. Educ. Law § 414, and the Board of Education's policy implementing that law, prohibit the use of school facilities for religious worship services. Plaintiffs initiated this suit pursuant to 42 U.S.C. § 1983, alleging that the defendants' policy, and the law on which it is based, violate the First and Fourteenth Amendments to the United States Constitution.

Plaintiffs now move for summary judgment granting them the relief they seek in their complaint, namely, a declaratory judgment and permanent injunction preventing the defendants from denying plaintiffs access to school district facilities because they intend to use those facilities to hold religious worship services. The defendants cross-move for summary judgment, asserting that § 414 is constitutional on its face and as applied to the plaintiffs. Defendants also argue that allowing the plaintiffs to use public school facilities for religious worship services would violate the Establishment Clause of the First Amendment.

For the reasons set forth below plaintiffs' motion is denied and defendants' motion is granted.

I.

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1. Plaintiffs' motion to substitute Jorge Vega, the new pastor of Full Gospel Tabernacle, for Robert Castro as a party to this action is granted. The Clerk of the Court is directed to amend the case caption accordingly.

Under Fed.R.Civ.P. 56(c), the moving party is entitled to summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering such a motion, "a district judge must view the evidence in the light most favorable to the non-moving party and must draw all inferences in favor of that party." *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 382 (2d Cir.1996). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Accordingly, summary judgment is warranted where, "after adequate time for discovery . . . [the nonmoving party] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

II.

The following facts are undisputed.

Full Gospel Tabernacle ("Full Gospel") is a Christian church currently meeting in a building owned by the church in Far Rockaway, New York. In late April 1994, Full Gospel determined that an alternative venue was needed for Sunday worship services to accommodate the church's growing membership. Accordingly, on May 6, 1994, Reverend Robert Castro, the pastor of Full Gospel Tabernacle, filed an application with Public School 105 Queens ("P.S.105"), a school located within Community School District 27 ("CSD 27"), to rent the school's auditorium, classrooms, and cafeteria

for each Sunday in June. Kenneth Grover, Deputy Superintendent of CSD 27, denied the application on May 16, 1994, citing Board of Education Standard Operating Procedure 5.9 (hereinafter referred to as "SOP 5.9"), which provides in part that "[n]o outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school."[2]

Reverend Castro applied again in late May 1994 to use the facilities of P.S. 105 every Sunday in July. Again his application was denied. Full Gospel then retained legal counsel, and filed the instant action on November 2, 1994.

Through discovery, plaintiffs learned that several other churches in the area had been allowed to conduct religious activities in school district buildings after school hours pursuant to permits issued by CSD 27.[3]

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2. The full text of SOP 5.9 is as follows:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains religious viewpoint or for distributing such material is permissible.

This regulation purports to implement N.Y. Educ. § 414, *see infra.*

3. The following organizations were also granted permits to use school facilities after school hours: American Legion for a County Convention Awards Assembly; Dance Dimension for dance recital rehearsals; the Department of Sanitation for basketball; Belle Harbor Property Owners Association for a Board of Directors Meeting; Rockaway Action for Mural Painting; Mercaz Hatorah for

In October 1993, CSD 27 granted Rita Speller, pastor of the Deliverance Temple Church, a permit to hold a Halloween party at P.S. 155. Following the Halloween party, Reverend Speller applied for, and received, permits to use the school facilities on Sundays and some weekday evenings almost every week from November 1993 through November 1994. Although Reverend Speller's initial application listed the activity as a Halloween party, no description of the activities to be conducted was included on subsequent permit application forms, and according to Reverend Speller's testimony, no one from the school district ever inquired about her intended use of the facilities. Speller Dep. at 18. Each permit was approved by Sheila McElhatten, secretary to the Director of Operations for CSD 27.

Reverend Speller testified that she used the school facilities to conduct the worship services of the Deliverance Temple Church. Speller Dep. at 26-27. On Sundays she would preach, teach the Bible to her congregation and engage in prayer. Speller Dep. at 7-8. On weekday evenings the facilities were used for a variety of activities, including a religious play, inspirational music and dance, and Bible discussion groups. Speller Dep. at 9-12. In November 1994, Reverend Speller was told she could no longer use the school's facilities because it had come to the attention of school officials that she was

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a basketball program; Congressman Schumer for a Town Hall meeting; Queens Kiwanis Club Girls Softball Team; Tappin-Feet for a dance recital; Local 372 for a union meeting; LWG Co-op Inc. for a shareholder's meeting; ARYA SAMAJ USA for a cultural evening; Eye of Tiger Karate for a karate tournament. CSD 27 has also granted permits to the Church of St. Paul, the New Hope Baptist Church, the Salvation Tabernacle and the Way of Life Gospel Center for gospel recitals. A permit was also issued to Rabbi Shlomo Volner for a Purim party. Pl. Rule 3(g) Stmt., ¶ 10.

conducting religious services on the premises. Speller Dep. at 23.

In June and July 1994, CSD 27 granted Lisa and Rubin Mitchell, pastors of the Jesus Family Fellowship, permits to use the auditorium of Junior High School 198 every Tuesday and Sunday in July and August 1994. Reverend Lisa Mitchell described the five services they held at JHS 198 as follows:

> We would come in and have what's called a group prayer, congregational prayer. Then we would go into praise and worship, sing different praise and worship songs accompanied by music. From there, Reverend Mitchell, he would get up and deliver the message, the service for that evening.

Mitchell Dep. at 12. Following Reverend Mr. Mitchell's sermon, the Reverends would engage in an "altar call," where they would "invite someone to receive the Lord as their Savior." Mitchell Dep. at 12. The service would then conclude with a closing prayer. Mitchell Dep. at 12. On Sundays, the Mitchells would also conduct religious instruction for children. Mitchell Dep. at 15.

The Mitchells testified that they informed McElhatten at the time they applied for the permit that they intended to use the school facilities for church services. Mitchell Dep. at 41. According to their testimony, McElhatten granted them a permit anyway, after concluding that the Mitchells' intended purpose fell within the second sentence of SOP 5.9, which allows use of school facilities for the "purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material . . . ." Mitchell Dep. at 68. However, on July 21, 1994, Kenneth Grover, deputy superintendent of CSD 27, informed the Mitchells that their

permit was rescinded effective immediately, citing SOP 5.9. When the Mitchells demanded an explanation, they were told that McElhatten had issued the permit in error. Mitchell Dep. 55-62.

The district does not deny that these incidents occurred. However, it contends that these permits were erroneously approved due to flaws in the permit application process which have been remedied since a new Director of Operations was hired in September 1994.

Typically, an application to use school facilities after school hours is first reviewed by the custodian and the principal for the school which the organization seeks to use. Brawer Decl., ¶ 8-10. The application is then forwarded to the district office for review and possible approval. Brawer Decl., ¶ 10. Through the fall of 1994, this review at the district level was performed by McElhatten as secretary to the Director of Operations for CSD 27. Brawer Decl., ¶ 11.

However, for most of 1994, the position of Director of Operations for CSD 27 was vacant. Brawer Decl., ¶ 7. When a new Director of Operations was hired for CSD 27 in September 1994, he discovered that McElhatten had granted several permits without any description of the activity and, in some cases, like those described above, for uses not permitted by Board of Education regulations. Brawer Decl., ¶ 12. To remedy this problem on a temporary basis, Grover instructed McElhatten in the Fall of 1994 to forward any unusual applications to his office for review. Brawer Decl., ¶ 13.

Since December 1994, the Director of Operations for CSD 27 reviews all permit applications personally, to ensure that all activities are fully described on the application and that no application is granted for an activity prohibited by Board of

Education regulations. Brawer Decl., ¶ 20. In addition, a memorandum was sent to all principals and custodians in the district reminding them that SOP 5.9 prohibits the use of school facilities for religious worship services. Brawer Decl., ¶ 23. Since enacting these procedures, the district has been successful in ensuring that school facilities are not used for religious worship services or instruction, and permits have been denied when such use was requested. Brawer Decl., ¶ 26.

Regardless, plaintiffs argue that the district's refusal to give Full Gospel access to school district facilities for religious worship services, in light of the other religious and secular activities which have taken place in school district buildings, violates the Free Speech Clause and the Free Exercise Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. In response, defendants argue that the district's policy and § 414 are constitutional on their face, and as applied to the plaintiffs, and that granting plaintiffs the relief they request would violate the Establishment Clause of the First Amendment.

III.

"Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 799-800, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985). In recognition of this principle, the Supreme Court has articulated a forum analysis, identifying three categories of public property for free speech purposes. An individual's right to speak on public property is thus "largely dependent on the nature of the forum in which the speech is delivered." *Bronx Household of Faith v. Community*

School District No. 10, 127 F.3d 207, 211 (2d Cir.1997).

First, there are traditional public forums, such as streets and parks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983). The second category, referred to in the caselaw as designated public forums, "consists of public property which the State has opened for use by the public as a place for expressive activity." *Id.* Content-based exclusions from both traditional and designated public forums must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.* at 45-46, 103 S.Ct. at 954-56. The third category, non-public forums, includes public property which is not by tradition or designation a forum for public communication. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955-56.

In addition, the Second Circuit has recognized a sub-set of designated public forums termed limited public forums. *See, e.g., Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679 (2d Cir.1988). This sub-category includes property designated by the government for use by certain groups or for the discussion of certain subjects. *Perry*, 460 U.S. at 46 n. 7, 103 S.Ct. at 955 n. 7; *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3448-49. As to those particular groups and subjects, the forum is an open one, and any regulation based on content must be narrowly tailored to serve a compelling government interest. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955-56. However, "[u]nder the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses, and exclusion of uses -- even if based upon subject matter or the speaker's identity -- need only be reasonable and viewpoint-

neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80 (citations omitted). "Where the proposed use falls outside of the limited forum, the State is subject to only minimal constitutional scrutiny." *Bronx Household of Faith*, 127 F.3d at 211 (citations and internal quotations omitted).

Both parties agree that a public elementary school is not a traditional public forum. *See Deeper Life*, 852 F.2d at 679 ("[P]ublic elementary schools are not, as to the general community, traditional public fora."). However, plaintiffs argue that CSD 27 school facilities have become designated public forums, either by virtue of § 414 or by the school district's practice of allowing a wide variety of secular and religious groups to use the facilities on a regular basis. Defendants dispute this characterization of the school facilities and argue that the facilities are only limited public forums, from which certain subjects, including religious worship services, have been constitutionally excluded. Since the level of scrutiny applied to plaintiffs' claims depends on the type of forum at issue, I must first resolve this threshold dispute.

Plaintiffs argue that § 414 of the New York Education Law designates public school facilities as open public forums. In support of this argument, plaintiffs quote portions of the statute, which states that school facilities may be used for "the purpose of instruction in any branch of education, learning or the arts" and for "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community . . . ." N.Y. Educ. Law § 414(1)(a), (c). According to plaintiffs, this broad language reflects the legislature's intent to designate public schools as open public fora.

However, the statute also specifically lists eight categories of permissive use. N.Y. Educ. Law § 414(1)(a)-(j). If the language quoted by the plaintiffs, standing alone, created an

open public forum, the remainder of the statute would be rendered meaningless. It is well-settled that reading a statute in this manner is disfavored. *Allen Oil Co. v. Commissioner of Internal Revenue*, 614 F.2d 336, 339 (2d Cir.1980) ("Normally, a statute must if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless.").

Moreover, a number of activities are specifically excluded from the list of permissible purposes.[4] For example, school

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4. A more complete excerpt of § 414 follows:

The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are

facilities may not be used for meetings or entertainment which are exclusive or not open to the general public, or which are being held for a commercial purpose. N.Y. Educ. Law § 414(1)(c)-(d). In addition, meetings sponsored by political organizations are not permitted unless specifically authorized by the district or the board of education. N.Y. Educ. Law § 414(1)(e). While a public school can be used for graduation exercises held by not-for-profit schools, that use is conditioned upon no religious service being performed. § 414(1)(j); *see* n. 4 *supra*.

Thus, reading the statute as a whole, I conclude that § 414 does not designate public school facilities as open public forums, but rather creates a limited public forum. This conclusion is reinforced by school district policy, expressed in SOP 5.9, which specifically excludes religious worship services as a permissible use. *See Bronx Household of Faith*, 127 F.3d at 212-13 (holding that the limitation imposed by SOP 5.9 "is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects.").

In the alternative, plaintiffs argue that defendants have

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under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization . . . .

The statute goes on to authorize use of public schools as polling places, and for civic forums and community centers, places of instruction for the mentally retarded, athletics, child care services during non-school hours, and "graduation exercises held by not-for-profit schools, *provided that no religious service is performed*." § 414(1)(e)-(j) (emphasis added).

created an open forum by practice by allowing a wide variety of secular and religious groups to use the school district's facilities on a regular basis. I find this argument unpersuasive, given the uncontested facts presented on this motion.

In *Perry*, 460 U.S. at 39, 103 S.Ct. at 951-52, the plaintiffs, a rival teachers' union, challenged the elected union's exclusive right of access to school mail facilities. In support of their access claim, plaintiffs argued that the school mail facilities had become an open forum because of the "periodic use of the system by private non-school-connected groups . . . ." *Id.* at 47, 103 S.Ct. at 955. The Supreme Court rejected this argument:

> If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then [plaintiffs] could justifiably argue a public forum has been created. This, however, is not the case. [T]here is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations . . . to use the facilities. This type of selective access does not transform government property into a public forum.

Id. at 47, 103 S.Ct. at 956.

A similar analysis is appropriate here. It is undisputed that § 414, and the Board of Education procedures implementing the statute, establish some criteria upon which permission to use school facilities is either granted or denied. The school

facilities are not open to indiscriminate use by the general public and applications for permits are reviewed by the school principal and custodian, and then again at the district level. Although it is clear that some applications were granted in contravention of Board policy, such departures from declared policy are hardly sufficient to create a contrary policy. Plaintiffs have presented no evidence that permission to use school facilities is granted as a matter of course to all who file an application. *See Cornelius*, 473 U.S. at 804, 105 S.Ct. at 3450 ("Although the record does not show how many organizations have been denied permission . . . ., there is no evidence suggesting that the granting of the requisite permission is merely ministerial.").

At most the proof shows that access has been granted to some groups. However, as the Supreme Court stated in *Perry*, "[t]his type of selective access does not transform government property into a public forum." 460 U.S. at 47, 103 S.Ct. at 956; *see also Cornelius*, 473 U.S. at 805, 105 S.Ct. at 3450-51; *cf. Widmar*, 454 U.S. at 265-68, 102 S.Ct. at 272-74 (holding that university created open forum through its policy of providing university facilities for the meetings of all registered student groups without qualification). The public elementary schools located within CSD 27 are simply not places that have been "devoted to general, unrestricted public assembly by long tradition or by policy or practice." *Bronx Household of Faith*, 127 F.3d at 212-13.

Thus, I conclude that the school facilities at issue in this case are limited public forums by virtue of § 414 and school district policy.[5] *See Bronx Household of Faith*, 127 F.3d at 212-13. As

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5. Accordingly, I reject plaintiffs' claim that § 414 and SOP 5.9 are facially unconstitutional since they "exclude religious speech

such, a speaker may be excluded from using school facilities after school hours "if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose special benefit the forum was created . . . ." *Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451 (internal citations omitted). Defendants assert that plaintiffs were denied access on the basis of a permissible subject matter distinction, since § 414 does not include religious worship services as a permissible use and SOP 5.9 explicitly prohibits use of the facilities for religious worship services.

However, once access is permitted based on subject matter or speaker identity, the constitutional right of access extends to other entities or speech of a similar character. *Perry*, 460 U.S. at 48, 103 S.Ct. at 956-57; *see also Travis v. Owego-Apalachin School District*, 927 F.2d 688, 692 (2d Cir.1991) ("[O]nce [the government] allows expressive activities of a certain genre [in a limited public forum], it may not selectively deny access for other activities of that genre."). Plaintiff argues that, even if the school district's facilities are considered limited public forums, they have been opened to religious worship services, despite SOP 5.9, as evidenced by the permits granted to Rita Speller of the Deliverance Temple, and Lisa and Rubin Mitchell of the Jesus Family Fellowship. As such, plaintiffs contend that the defendants' refusal to grant Full Gospel a permit to conduct similar religious worship services on school property after school hours amounts to unconstitutional viewpoint discrimination.

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from an *otherwise open forum* based upon its religious content." Pl. Mem. in Support of Mot. for Sum. Judgmt. at 19 (emphasis added). As discussed in text, CSD 27 public school facilities are not open public forums.

The past practice of the school district in granting access to its facilities is a relevant factor in determining whether the school district has opened its limited forum to religious worship services. *See Deeper Life I*, 852 F.2d at 680; *see also Travis*, 927 F.2d at 693. In *Travis*, the school district granted a permit to an organization called "On the Level Music!" to hold a Christmas concert in the middle school auditorium called "A Concert For the King -- Christmas in Owego." 927 F.2d at 693. The program consisted of twelve Christian hymns and a Bible reading by the mayor of Owego. *Id.* Several years later, Birthright of Owego, a pro-life pregnancy counseling organization, requested permission to use the middle school auditorium for a magic show by a Christian illusionist. *Id.* at 690. The program was to consist of an ordinary magic show, followed by a short message promoting the Christian gospel. *Id.* at 693. Despite the similarities between the two programs, the school district denied Birthright a permit on the basis that the proposed magic show would involve religious activity. *Id.* at 691.

Birthright and the Christian illusionist, Toby Travis, sued the school district, alleging that the district's refusal to grant them a permit violated their free speech rights. The district court granted plaintiffs summary judgment on their free speech claim. On appeal, the Second Circuit held that the Christmas program had created "at least a limited public forum for fund-raisers with religious themes." *Id.* As such, "permitting a fund-raiser with a religious theme while excluding one with a different religious theme is not viewpoint-neutral as a matter of law . . . ." *Id.* at 694. Since the school district failed to provide a constitutionally sufficient explanation for the different treatment, the Court of Appeals affirmed the District Court's grant of summary judgment to plaintiffs. *See also Trinity United Methodist Parish v. Board of Education*, 907 F.Supp. 707 (S.D.N.Y.1995) (holding that school district could not deny

permit to church seeking to hold magic show by christian illusionist when it subsequently granted permit to another church for gospel concert).

Plaintiffs argue that similar facts are present here. It is undisputed that the defendants granted permits to the Deliverance Temple Church and the Jesus Family Fellowship and that both organizations held religious worship services and instruction on school property after school hours on a regular basis. Accordingly, relying on *Travis*, plaintiffs argue that the defendants are constitutionally obligated to grant them permission to conduct religious worship services on school property after school hours, since such activity has been permitted in the past.

The instant case is distinguishable from *Travis*. In *Travis*, the defendants asserted that they had genuinely misunderstood the religious nature of the Christmas concert. 927 F.2d at 693. The Court rejected this defense, and charged the defendants with the knowledge that the program was an openly religious affair. *Id.* However, it was critical to the court's analysis that

> [t]here is no evidence in the record that the School District, having learned that it had mistakenly permitted a religious program in violation of its policy, took steps to prevent a similar mistake in the future, and that such corrective measures caused the denial of [plaintiff's] application.

Id. Moreover, counsel for the school district in *Travis* could not even guarantee that the school district would deny permission for another Christmas program in the future. *Id.*

Unlike the school district in *Travis*, the Board of Education in the case at bar promulgated a clear policy, binding upon the defendant school district, that prohibits the use of school

facilities for religious worship services.[6] It is undisputed that McElhatten, a secretary in the school district office, failed to properly implement this policy by granting a permit to the Deliverance Temple Church without any description of the activity to be conducted and one to the Jesus Family Fellowship, after erroneously interpreting SOP 5.9.[7] In addition, it appears from the record that defendants were not aware that McElhatten had granted permits for religious worship services in violation of SOP 5.9 until plaintiffs brought

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6. In *Travis*, the court of appeals noted that the school district's policy was to treat applicants whose programs have religious themes on an ad hoc basis. 927 F.2d at 694. As a result, the court of appeals modified the district court's injunction to prohibit denial of access to the *Travis* plaintiffs, "unless the School District expressly adopts a new policy that treats all programs with a religious theme equally." *Id.* Such a policy is present in the case at bar in the form of SOP 5.9. The permit denial in this case was not due to an ad hoc decision in the absence of a clear policy, but rather McElhatten's failure to properly implement the district's policy.

7. Plaintiffs also point to permits granted to the Salvation Tabernacle Church and several other churches for gospel concerts as evidence that the school district has opened its facilities to religious worship services and instruction. However, the Second Circuit has held that a concert that consists of gospel and spiritual music is a musical program, not a religious event which opens the forum for other religious activity. *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 387 (2d Cir.1992), *rev'd on other grounds*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). One could also characterize a gospel concert as music from a religious perspective. *See* SOP 5.9. Although the "sacred concert" held by the Salvation Tabernacle Church included an opening prayer and closing salvation message, these were very brief and did not constitute the bulk of the program.

the matter to the school district's attention.[8] It is undisputed that once school district officials became aware of these violations of district policy, the erroneously issued permits were immediately revoked.

Moreover, review of permit applications was transferred from McElhatten to Kenneth Grover, deputy superintendent of CSD 27, and later permanently transferred to the Director of Operations for CSD 27. In addition, all principals and custodians were reminded by memorandum that SOP 5.9 prohibits use of school premises for religious worship services and that it is their responsibility to ensure adherence to the policy. These school officials were also charged with the responsibility to inquire further about an organization's proposed purpose if that purpose is unclear, by requesting a flyer or other documentation from the organization.[9] If the school principal or custodian becomes aware that the policy has been violated despite these precautions, they are to report any violations to the district office and send a warning letter to the organization.

Significantly, since these corrective measures were taken, no permits have been issued for religious worship services or

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8. It is important to note that plaintiffs' application for a permit was denied by Kenneth Grover, deputy superintendent of CSD 27, not McElhatten.

9. Plaintiffs suggest that this type of further inquiry into the religious nature of an organization's proposed purpose would cause an entanglement between church and state. However, in *Bronx Household of Faith*, 127 F.3d at 215, the court of appeals held that the distinction between religious services and the discussion of permissible topics from a religious viewpoint was not a difficult distinction for school authorities to make.

instruction, and requests to use school facilities for such activity has been denied. Accordingly, unlike the defendants in *Travis*, defendants in this case "took steps to prevent a similar mistake in the future" once they learned that the policy had been violated. Moreover, in contrast to the corrective measures evaluated unfavorably by Judge Parker in *Trinity*, *see* 907 F.Supp. at 716, defendants' steps in this case appear to be effective.

In sum, the defendants have not opened a limited public forum for religious worship services by virtue of the fact that permits were granted on two prior occasions for such use, in light of the facts that these permits were granted by an individual who failed to properly implement the district's clear policy against such use, and the district promptly corrected these errors and took effective steps to prevent such a mistake in the future.[10] Since the Second Circuit has already held that SOP 5.9 is a reasonable regulation, *see Bronx Household of Faith*, 127 F.3d at 214-15, plaintiffs' exclusion from school

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10. I recognize that in *Bronx Household of Faith*, the court of appeals observed several times that the school district in that case had never previously rented a school for the religious purposes intended by the plaintiff in that case. *See, e.g.*, 127 F.3d at 212-13 ("What is not permitted under SOP 5.9 is the use of school premises for worship or instruction, and it is important to note that the parties have agreed that District # 10 never has rented a school property for that purpose.") But I do not read that language as holding or suggesting that a minor school bureaucrat's uninformed and inadvertent permission for such use by other churches, in derogation of district policy, confers upon the plaintiff church at bar a permanent license to hold religious services in public schools. This is the logical conclusion of plaintiffs' argument, but the school district's contrary policy, clearly declared, cannot so lightly be cast aside.

facilities was therefore constitutional, as long as the exclusion of religious worship services is viewpoint neutral.

IV.

Plaintiffs argue that the exclusion of religious services is unconstitutional viewpoint discrimination, regardless of forum designation. Plaintiffs point out that § 414 allows "instruction in any branch of education, learning or the arts," "social, civic and recreational meetings . . . and other uses pertaining to the welfare of the community." Plaintiffs contend that religious worship services and instruction is speech within these categories from a religious, rather than secular, perspective. As such, according to plaintiffs, the exclusion of religious worship services and instruction constitutes unconstitutional viewpoint discrimination.

In support of their argument, plaintiffs rely on *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). In that case, the defendant school district, on the basis of § 414, denied the plaintiff a permit to use school facilities after school hours to show a six-part film on parenting from a Christian perspective. *Id.* at 388-89, 113 S.Ct. at 2144-45. The district court and the court of appeals both rejected the plaintiff's claims, holding that the school property was a limited public forum from which activities with a religious purpose had been constitutionally excluded. *Id.* at 389-90, 113 S.Ct. at 2144-45. The Supreme Court reversed, holding that it was unconstitutional viewpoint discrimination to allow school property to be used for the expression of views on family issues and child-rearing, without also allowing the property to be used for the expression of a religious viewpoint on the same subjects. *Id.* at 394, 113 S.Ct. at 2147 ("The film series involved here no doubt dealt with a subject otherwise

permissible . . ., and it exhibition was denied solely because the series dealt with the subject from a religious standpoint."). Plaintiffs argue that this holding applies equally to the case at bar.

The distinction between content and viewpoint is "not a precise one." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831, 115 S.Ct. 2510, 2517, 132 L.Ed.2d 700 (1995) (university's denial of printing cost funding to student newspaper with Christian editorial viewpoint condemned as viewpoint discrimination). In the case at bar, although SOP 5.9 prohibits the use of school facilities for *religious worship services*, it allows "the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or *material which contains religious viewpoint* or for distributing such material." (emphasis added). In *Bronx Household of Faith*, 127 F.3d at 214-16, the Second Circuit held that this distinction is tenable and "not difficult for school authorities to make," *id.* at 215, and that the exclusion of religious worship services does not amount to unconstitutional viewpoint discrimination. I am bound by this very recent appellate decision.[11]

Since the exclusion of religious worship services is reasonable in light of the purposes served by the forum and viewpoint neutral, *see Bronx Household of Faith*, 127 F.3d at 215, plaintiffs' free speech rights were not violated by the defendants' denial of their permit application.

V.

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11. The Second Circuit decided *Bronx Household of Faith* on September 15, 1997.

Plaintiffs also assert claims under the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. Identical claims were rejected by the Second Circuit in *Bronx Household of Faith*, 127 F.3d at 215-17. Plaintiffs also assert a claim under the Religious Freedom Restoration Act of 1993. However, that claim must be dismissed with prejudice in light of the Supreme Court's determination in *City of Boerne v. Flores*, --- U.S. ----, ----, 117 S.Ct. 2157, 2172, 138 L.Ed.2d 624 (1997), that the Religious Freedom Restoration Act is unconstitutional. *See Bronx Household of Faith*, 127 F.3d at 217.

VI.

For the foregoing reasons, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted. Plaintiffs' earlier motion for a preliminary injunction is also denied for the reasons state above.[12] The Clerk of the Court is directed to dismiss the complaint with prejudice.

It is SO ORDERED.

/s/ Charles S. Haight, Jr.
Charles S. Haight, Jr.
U.S.S.D.J.

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12. Plaintiffs' recent Motion for Ruling is granted. In addition, although plaintiffs' attorneys, Mark N. Troobnick, Esq. and Jay Alan Sekulow, Esq., assert that their motions to appear pro hac vice are also pending, those motions were granted on December 6, 1994.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FULL GOSPEL TABERNACLE	)	97-9235
	)	
vs.	)	
	)	
COMMUNITY SCHOOL DISTRICT 27	)	
	)	

[Sept. 1, 1998]

ORDER

Before: HON. RALPH K. WINTER, C.J.

IT IS HEREBY ORDERED that the motion for hearing in banc has been transmitted to the judges for the Court in active service and no such judge has requested that a vote be taken thereon.

FOR THE COURT,

CAROLYN CLARK CAMPBELL, Clerk
by:

/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX D

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Fourteenth Amendment, section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

APPENDIX E

N.Y. Educ. Law § 414

(McKinney 1988 & Supp. 1999)

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the

petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social

services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

APPENDIX F

SOPM 5.1 to 5.12.4 (date 10/93)

Standard Operating Procedures
Schools
Division of Business and Administration

Chapter: EXTENDED USE OF SCHOOL BUILDINGS

Topic 5. REGULATIONS GOVERNING THE EXTENDED USE OF SCHOOL FACILITIES

Applicants are responsible for adhering to all applicable provisions of this chapter, including the regulations set forth below.

5.1 Permit holders shall exercise the utmost care in the use of school premises and property; make good any damage arising from the occupancy of any part of school premises; and save harmless the Board of Education from any claim, loss, or damage by reason of any act on the part of the permit holder, its members, officers, employees and agents, or any person using or coming upon the premises by invitation or with the permission of the permit holder.

5.2 The use of school facilities must be in accordance with federal law, New York State law, local law and Board of Education policies.

5.3 The primary use of school premises must be for Board of Education programs and activities.

5.4 Every group or organization must have an approved

permit to use a school's premises.

5.5 After Board of Education programs and activities, preference will be given to use of school premises for community, youth and adult group activities.

5.6 In addition to the use described in items 2.11, 5.3 and 5.5, school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

5.6.3 For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive athletic

contests of children attending nonpublic, nonprofit schools.

5.6.6 For such other uses as may be authorized by law.

5.7 Organizations requesting space where fund-raising or solicitation or acceptance of donations will take place, must observe the specific rules outlined in 2.11.

5.8 School premises may not be used for commercial purposes, except for flea market operations authorized pursuant to Regulation of the Chancellor, A-650.

5.9 No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

5.10 Classrooms and offices must be left in the same condition in which they were found. Desks, displays, papers, etc., shall not be disturbed.

5.11 Masking tape, plastic tape and similar substances shall not be used to affix materials to painted surfaces or chalkboards.

5.12 Where services by Board of Education employees are required by these regulations, the applicant organization is responsible for all charges incurred.

5.12.1 When shop rooms, home economics rooms, or similar rooms with special equipment are required, a licensed Board of Education teacher must be assigned.

5.12.2 Where kitchen equipment is to be used in the preparation of food, an Office of School Food and Nutrition Services employee must be assigned.

5.12.3 For the use of audio-visual equipment, public address systems, stage lighting, pianos and similar items, prior approval of the principal must be obtained in writing, with a copy attached to the Permit Application. Only Board of Education assigned persons may operate school equipment.

5.12.4 For the use of swimming pools, one Board of Education licensed swimming teacher or a licensed Board of Education teacher with current American Red Cross Water Safety Instructor's certification must be assigned for every 25 pool participants. All persons participating in pool activities must have their head and shoulders above the water at the shallow end of the pool. The appropriate Department of Health regulations regarding the use and operation of swimming pools must be observed.